SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 33

EDGAR SMITH,

Petitioner,

vs.

STATE OF TEXAS.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS AND BRIEF IN SUPPORT THEREOF.

WM. A. VINSON,
HARRY W. FREEMAN,
SAM W. DAVIS,
Counsel for petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Edgar Smith, respectfully prays for a Writ of Certiorari herein to review a certain final decision of the Court of Criminal Appeals of Texas, being the highest court of said State in which a decision could be had, the original opinion and decision of said court having been rendered on January 24, 1940 (R. 43-46), and a motion for rehearing having been filed within the time provided by the laws of said State (a copy of which is hereto attached, marked "Exhibit A") was, after being entertained and considered by said court, overruled by a written opinion rendered on February 21, 1940 (R. 46-52).

Statement of the Grounds of Jurisdiction.

This cause originated in the Criminal District Court No. 2 of Harris County, Texas, wherein petitioner, a negro farm boy eighteen years of age at the time of his arrest, was charged by indictment with the offense of rape upon the person of Linda Heiden, a white woman, on or about August 1, 1938, in Harris County, Texas. Being poor and friendless, without known family or relatives, your petitioner was unable to secure the services of paid counsel and therefore, as provided by Article 494 of the Code of Criminal Procedure of Texas, the Hon. Langston G. King, judge of said court, appointed Harry W. Freeman and Sam W. Davis, attorneys, to defend him.

In due time petitioner, through his said counsel, presented to the judge of said Criminal District Court a motion to quash the indictment on the ground that petitioner had been denied the equal protection of the laws guaranteed to him by the Fourteenth Amendment to the Constitution of the United States, by Section 19 of Article 1 of the Constitution of the State of Texas (Bill of Rights) and Article 338 of the Code of Criminal Procedure of the State of Texas, in that the Grand Jury Commissioners of Harris County, Texas, had arbitrarily and systematically for a period of many years excluded all persons of African descent from serving on the Grand Jury, or, in any event, the number of negroes selected by the Grand Jury Commissioners for service on the Grand Jury for many years prior to the indictment of petitioner had been so negligible as in itself to show and establish such unlawful discrimination and that such discrimination was particularly practiced in the selection of the Grand Jury for the term of said court at which the indictment against your petitioner was returned, by excluding all qualified negro citizens solely because of their race or color and not because such negro citi-

zens lacked the qualifications prescribed for Grand Jurors in the State of Texas by Article 339 of the Code of Criminal Procedure of said State. ("Exhibit B".)

The State filed an answer contesting the motion. In due time said motion came on for hearing, and all the testimony so adduced is embodied in appellant's Bill of Exceptions No. 1 (R. 21-40). At the conclusion of such testimony, the Trial Court entered an order overruling the motion (R. 9). Upon a trial of the issue of guilt, your petitioner was convicted and sentenced to confinement in the State Penitentiary for life. Petitioner timely presented, in the manner and form provided by law, an appeal from the judgment of the Criminal District Court to the Court of Criminal Appeals of Texas, which court on January 24, 1940, after having heard and considered said cause, entered its judgment in all things affirming the judgment of the Criminal District Court (R. 43-46). Thereafter, your petitioner within the time and in the manner required by law, filed his Motion for Rehearing in the Court of Criminal Appeals of Texas, and such motion was in all things overruled by said Court of Criminal Appeals on February 21, 1940 (R. 46-52).

The Court of Criminal Appeals of Texas is the court of last resort in all cases of a criminal nature prosecuted under the laws of Texas, and is the highest court of said State in which a decision of this cause could be had; that it is constituted the court of last resort and the highest court of criminal jurisdiction by the provisions of Section 5 of Article 5 of the Constitution of the State of Texas ("Exhibit C") and that the judgment of the Court of Criminal Appeals of Texas upon overruling petitioner's motion for rehearing is final and conclusive unless it be reversed by the Supreme Court of the United States. (Article 819 Code of Criminal Procedure of Texas, "Exhibit D".)

The judgment of the Court of Criminal Appeals is a final judgment within the purview of section 344 (b) Title 28

U. S. C. A. (section 237 of the Judicial Code, amended), reading as follows:

> "Or where any title, right, privilege or immunity is especially set up or claimed by either party under the constitution * * * and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied * * *"

And paragraph 5(a) Rule 38, of the Rules of the Supreme Court, as follows:

> "Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

Sole Question for Decision.

The only question involved in this cause is: Must a negro defendant in a State Criminal Court introduce evidence showing a *total exclusion* of members of his race from grand juries in order to establish a violation of the equal protection clause of the Fourteenth Amendment? In other words, may officers of a State tribunal cover up their intended discrimination against the negro race by a thin veneer of compliance and thereby evade the prohibition of the Fourteenth Amendment?

Sole Proposition.

Where twenty per cent of a county's population is comprised of negroes of whom from six to seven thousand possess the statutory qualifications for grand jurors, and the undisputed evidence shows that *occasionally* throughout a period of nearly ten years, *one negro* is selected by all-white Grand Jury Commissioners but is placed in such an unfavorable position on the panel (*sixteenth on the list*) as to make it unlikely that he will be selected by the judge in impaneling

the Grand Jury, and the evidence further shows that no negro had been a member of the last ten consecutive Grand Juries, including the one which indicted petitioner, it constitutes a denial of the spirit of the equal protection of the laws within the meaning of the Fourteenth Amendment, and the Court of Criminal Appeals of Texas erred in holding to the contrary.

The Court of Criminal Appeals of Texas held in effect that because the evidence did not show such total exclusion, or, in other words, because the evidence did show that during a period of nearly ten years five negroes actually served on Grand Juries in Harris County, though none had served upon ten consecutive Grand Juries, including the one which indicted petitioner, unlawful discrimination was not established. In his motion for rehearing ("Exhibit A") your petitioner assigned as error the complaint of holding of the Court of Criminal Appeals, pointing out and calling that court's attention to certain undisputed evidence which he contended established the prohibited discrimination as a matter of law *when judged by its effect and not by its form.*

In support of the foregoing grounds for the writ, your petitioner submits the accompanying brief showing more fully the precise facts and arguments applicable thereto.

Wherefore, your petitioner respectfully prays that this Honorable Court issue a writ of certiorari to review the judgment of the Court of Criminal Appeals of Texas, that its judgment be reversed, and that the motion to quash the indictment herein be sustained.

EDGAR SMITH, *Petitioner,*
WM. H. VINSON,
HARRY W. FREEMAN,
Sterling Bldg.,
Houston, Texas,
SAM W. DAVIS,
His Attorneys of Record.

STATE OF TEXAS,
County of Harris,
Southern District of Texas:

Edgar Smith, being duly sworn, deposes and says:

I am now confined in the County Jail of Harris County, Texas; I am the petitioner named in the foregoing petition for certiorari, have carefully read the same and know the contents thereof, and that the same are true of my own knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters I believe them to be true.

EDGAR SMITH.

Subscribed and sworn to before me this 6th day of March, 1940.

J. S. BRACEWELL, JR.,
[SEAL.] *Notary Public, Harris County, Texas.*

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 33

EDGAR SMITH,

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STATE OF TEXAS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

Petitioner, a penniless and friendless negro farm boy, eighteen years of age at the time of his arrest, was convicted for rape upon a white woman and sentenced to confinement in the State Penitentiary for life.

The undisputed testimony shown by the record reveals this to be a very strange case, perhaps the strangest ever tried by a court in the South or elsewhere. For such undisputed testimony, in fact testimony given by Everett Franklin, a son-in-law of prosecutrix, shows that following the alleged commission of the offense this negro boy was found by the witness lying down on the front porch of the

house where the offense is alleged to have taken place, and *he was aroused from his sleep by the witness.* And what is quite significant no less than strange is the fact, established by the undisputed testimony given by the defendant and the witness, Everett Franklin, that the accused was asked by this witness, apparently in the most casual manner, "What's the matter between you and my mother-in-law?" To which the defendant answered: "It wasn't anything as I knows of." Throughout the trial, petitioner maintained his innocence, testifying that the act of intercourse had taken place at the invitation and with the consent of prosecutrix.

Errors Below Relied on Here.

Petitioner relies on the following points:

1. The trial and conviction of a negro upon an indictment found and returned by a grand jury of white persons, from which all qualified negroes had been excluded solely on account of face or color, pursuant to a long continued and established practice, is a denial of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States, and the Court of Criminal Appeals of Texas erred in holding to the contrary.

2. Where twenty per cent of a county's population is comprised of negroes of whom from six to seven thousand possess the statutory qualifications for grand jurors, and the undisputed evidence shows that *occasionally* throughout a period of nearly ten years, *one negro* is selected by all-white Grand Jury Commissioners but is placed in such an unfavorable position on the panel (*sixteenth on the list*) as to make it unlikely that he will be selected by the judge in impaneling the grand jury, and the evidence further shows that no negro had been a member of the last ten consecutive grand juries, including the one which indicted petitioner,

it constitutes a denial of the spirit of the equal protection of the laws within the meaning of the Fourteenth Amendment, and the Court of Criminal Appeals of Texas erred in holding to the contrary.

3. The trial court denied petitioner's rights to equal protection of the laws under the Fourteenth Amendment in overruling his motion to quash the indictment on the ground that qualified negroes had been excluded from the grand jury solely on account of race or color, and the Court of Criminal Appeals of Texas erred in affirming the judgment of the trial court.

Proof of Exclusion.

Card G. Elliot, one of the Grand Jury Commissioners who selected the Grand Jury for the August term of 1938, when this defendant was indicted, testified (R. 21-25) that they selected the grand jurors merely from their personal acquaintance with the people over the county; that they had neither a poll-tax list nor a property-tax list while making the selection; that he assumed that there were quite a number of eligible grand jurors among the negroes of Harris County, "But I don't know how many have paid their poll-tax. I made no investigation to determine the number of negroes who had paid their poll-tax. I did not make any effort to determine whether any negro possessed the qualifications according to the statute. I don't know if the other commissioners did; if they did, I don't know" (R. 23-24).

T. L. Culpepper, the other commissioner, testified:

> "I did not suggest the name of any negro to be placed on the list, because I wasn't personally acquainted with any member of the negro race" (R. 36).

C. F. Richardson, a negro newspaper publisher in Harris County since 1916, testified that there were approximately 8,000 colored poll-tax payers in that county, that a majority

of those are of sound mind and good moral character, that approximately 6,000 of them were male persons who were qualified grand jurors. We quote from his testimony (R. 30).

> "I have never served on a grand jury, or been on the grand jury panel. I can almost count or name the negroes who have served on the grand jury in the last ten years. They are R. L. Anders, deceased; Sam Wilson, deceased; Louis Watson, deceased; Homer McCoy, deceased; C. W. Rice; Newman Dulley, I. M. Terrel, deceased, and the last one to serve, in 1936, was A. W. Taylor, special police officer. Two of them served more than once; one was Louis Watson. Sam Wilson served three or four times. They both ran white barber shops; the others served only once. Alex Taylor was a special officer at the time he served on the grand jury.
>
> "I found on looking over our newspaper files that there were no negro grand jurors in Harris County during 1938. We keep a record of them in our newspaper files. There was one negro on the venire of sixteen during 1937, but he was not selected. Alex Taylor served as a grand juror in 1936. As far as my memory serves me he was the only negro to serve on the grand jury that year. In the newspaper business we consider it good news when a negro is placed on the grand jury, and so we keep a close check. We usually put such an event on the front page with a streamer heading. I don't recall if any negroes served on the grand jury in 1935. I don't recall about 1934. I could check our records for those two years and find out."

R. R. Grobe was another witness who testified at the hearing of the motion. He said he was in the barber business and chairman of the Educational Committee of the Third Ward Civic Club. Among other things he testified (R. 26-27):

> "From my knowledge of the colored population I know many negroes in this county who are of sound

mind and good moral character, who are able to read and write; who have not been convicted of a felony, and who are not under indictment or other legal accusation for theft, and who have paid their poll-tax and are qualified to vote. My best estimate is there are about 8,000 such negroes in Harris County in 1938. We have about 400 teachers in our school system who are negroes; about fifty per cent of them are male. There are upward of several thousand negroes in this county who have had a high school education. There is a college for negroes here; they have ten or twelve male teachers. We have a goodly number possessed with the qualifications for grand jurors.

"I have lived in Houston twenty-two years. I don't know the number of negroes who have served on grand juries in Harris County during that period; I know occasionally we have a negro on the grand jury. I do not know how many served during 1938. The other negroes generally know about it when a negro serves on the grand jury. Our observation is that one or two negroes have served on grand juries, for instance, Watson and Jim Wilson in his life time seemed to alternate on grand juries. They were not the only two, but they served pretty regularly when negroes were selected. They were sort of standing grand jurors, according to my observation. I know one other negro that served. Both Watson and Jim Wilson were barbers; they were both good citizens; they shaved white people exclusively. Wilson died a few years back and so did Watson. Since they died I recall two negroes who have served on the grand jury in this county, C. W. Rice and a man named Terrell. Terrell is now dead; Rice is a newspaper man here. Outside of those I don't know of any other negroes who have served."

J. E. Robinson (R. 31-32) testified that he knew the qualifications of grand jurors, that he was acquainted with the negro population in Harris County and that seventy-five per cent of the colored male population met the requirements; that he was Vice-Supreme Commander of the American

Woodmen Fraternal Life Insurance Company, and his work brought him in contact with many negroes who are educated and law-abiding citizens and that he had never served on the grand jury though he had lived in Houston for a period of thirteen years. Further testifying he said:

> "I know three or four negroes who have served on grand juries in the past ten years. I know Homer McCoy was one; he's deceased. I know of Sam Wilson, I. M. Terrell, both deceased, and C. W. Rice, now living. I don't recall the others who served now. I don't know of any that served in 1938. I would know if any had served."

L. L. Lockhart testified that he was a negro man, had lived in Houston for thirty years, was a retired U. S. mail carrier, had worked for the U. S. government for twenty-eight years in Houston, delivering mail to white people, and was Grand Deputy Marshall of the Colored Masons of Texas. Further testifying he said:

> "I have never served on a grand jury. I do not know of any negro serving on the grand jury of Harris County in 1938, or in 1936. I think I have heard of some serving in the last ten years. I think that Sam Wilson served on a grand jury within the last ten years.
>
> "I know that most of the negroes in this county can read and write; there are very few illiterate negroes in this county. As far as I know they are all law-abiding citizens of sound mind, and have not been convicted of a felony. Being a mail carrier I could have served, or could have been excused."

The testimony of R. J. Lindley, the clerk of the Criminal District Court, shows that John Kerr was the only negro on the grand jury panel for 1938, but was not taken because he was too far down on the list; that Pierre Marks, another negro, was on the list for the November term of 1937, but that he did not serve for the same reason.

Alex Taylor was on the list for the February term of 1936 and was the only negro who served on the grand jury during that entire year.

W. B. Watson was on the list for the November term of 1935 but he did not serve because he was number 16 on the list.

For the August term of 1935, C. W. Rice, a negro, was on the list. He did not serve but the reason is not shown.

L. G. Luper was on the grand jury panel for the May term of 1935. He was number 16 on the list and of course he was not selected.

T. M. Fairchild, a negro, was likewise sixteenth on the list for the February term of 1935 and did not serve for the same reason.

James D. Ryan was number 16 on the list for the August term of 1934. He did not serve.

Harry Mack was number 16 on the list for the May term of 1933 and did not serve.

Bernice Booth was number 16 on the list for the August term of 1931 and did not serve.

Judge Langston G. King, who heard the motion to quash the indictment, called as a witness by the State, testified:

> "There has only been one negro on a grand jury panel at one time. I don't know why the negro on the grand jury panel has been number sixteen; it hasn't been that way all the time, but *practically all of the time*. I don't know why, with the one or two exceptions, the negro has always been below the twelfth man. (R. 39) In the other instances the negro would usually be number sixteen on the list and as I understand it the statute says that the first twelve qualified will be selected as the grand jury; in fact, often the last two or three white men on the list are not reached as grand jurors" (R. 40).

In conclusion Mr. Lindley testified that he had never seen a negro grand jury commissioner since the date when the

court was first created on January 1, 1928. Judge King's testimony on this point (R. 39) went further back, stating "I don't know of any negro being a grand jury commissioner as far back as 1925."

Summary of the Evidence.

Summarized, the evidence shows:

That no Negro served upon the grand jury which indicted the defendant, nor was any Negro drawn as a member of the grand jury panel of sixteen from which the grand jurors were selected by the court; that no Negro served on any grand jury during the entire year of 1938; that more than twenty per cent of the population of Harris County, Texas, at all times material to this inquiry, were Negroes; that of eighty-five thousand poll taxes of both men and women paid, eight thousand were Negroes and of which eight thousand Negroes some four thousand to six thousand of them were men possessing the qualifications of grand jurors as enumerated in the statute; that only the better class of the Negro population of said county are sufficiently interested to pay their poll taxes and those who pay their poll taxes at all represent the better type and law-abiding Negro population; that of those Negroes who were shown to have paid their poll taxes many of them are high school graduates and elementary, high school and college teachers, also members of various professions, and all possessing the qualifications of grand jurors; that only one Negro for the entire year of 1938 was merely placed upon the grand jury panel of sixty-four names during the said year, and he did not actually serve because "There were twelve qualified grand jurors on the list before him, and his name was not reached" (testimony of District Clerk). That during the past ten years the record shows the names of only eighteen Negroes were drawn by the grand jury commissioners out of a total list of six hundred and forty constituting the total grand jury panel for such period; that the last Negro to serve on a grand jury of Harris

County was Alex Taylor, a member of the grand jury for the February term, 1936; that another Negro, Lewis Watson, served as a member of the May term, 1934; that a Negro, Homer E. McCoy, served on the May term, 1932; W. P. Cartwright served in November, 1931; that of the three grand jury commissioners appointed by the court to select the grand jury no Negro has ever been appointed within the memory of the clerk of the court nor of the Trial Judge, both of whom testified at the said hearing; that of the total of four hundred and eighty grand jurors who actually served during the past ten years only five were Negroes; that never more than one Negro was ever drawn by the grand jury commissioners and this has occurred not more than twice in any year for the past ten years except the year 1935, and that almost invariably the Negro's name appears No. 16 upon the list; and that as a general rule the court in selecting the grand jury from the grand jury panel calls the first twelve on the list.

Authorities.

Carter v. *Texas,* 177 U. S. 442, 20 S. Ct. 687, 44 L. Ed. 839;

Collins v. *State,* 60 S. W. 42;

Guinn v. *United States,* 238 U. S. 347, 35 S. Ct. 926, 59 L. Ed. 1340, L. R. A. 1916 A, 1124;

Johnson v. *State,* 124 S. W. (2d) 1001;

Juarez v. *State,* 277 S. W. 1091;

Lane v. *Wilson,* 307 U. S. 268, 59 S. Ct. 872;

Martin v. *Texas,* 200 U. S. 316, 319, 26 S. Ct. 338, 50 L. Ed. 497;

Montgomery v. *State,* 55 Fla. 97, 455 So. 879;

Norris v. *Alabama,* 297 U. S. 587, 55 S. Ct. 579;

Pierre v. *Louisiana,* 306 U. S. 354, 59 S. Ct. 536, 83 L. Ed. 540;

Smith v. *State,* 77 S. W. 453;

Whitney v. *State,* 59 S. W. 895;

Constitution of the United States, Fourteenth Amendment, 28 U. S. C. A., Sec. 344 (b);
Sec. 237 Judicial Code, amended;
Rule 38, par. 5 (a), Rules of Supreme Court;
Sec. 19, Article 1, Constitution of Texas (Bill of Rights);
Sec. 5, Article 5 Constitution of Texas;
Articles 338, and 339, Code of Criminal Procedure of Texas;
Art. 819 Code of Criminal Procedure of Texas.

ARGUMENT.

The constitutional principle applicable herein has been well stated in *Carter* v. *Texas*, 177 U. S. 442, 20 S. Ct. 687, 44 L. Ed., and in *Martin* v. *Texas*, 200 U. S. 316, 319, 26 S. Ct. 338, 50 L. Ed. 497:

> "What an accused is entitled to demand, under the constitution of the United States is that, in organizing the Grand Jury as well as in the impaneling of the petit jury, there shall be no exclusion of his race, and no discrimination against them, because of their race or color."

The decisive question in this case is: Does the evidence adduced upon the hearing of the motion to quash the indictment show as a matter of law the prohibited discrimination and exclusion?

It is respectfully submitted that such evidence clearly establishes discrimination against the negro race in the appointment of the grand jury commissioners by the District court and the selection of the grand juries by the commissioners for many years prior to and during the year 1938. The fact that a few jurors, not more than five (according to the testimony of R. J. Lindley, the district clerk, R. 33-34, 37-38) actually served during a period of nearly ten years, while other negroes were merely

placed on the list and invariably were not selected because they were too far down on the list shows, as was said by Judge Henderson in *Smith* v. *State*, 77 S. W. 453, "an attempt to avoid the effect of the decisions of the Supreme Court of the United States instead of an effort to comply with the Fourteenth Amendment and the decisions thereunder."

The quoted testimony of the grand jury commissioners Card G. Elliot and T. L. Culpepper shows an utter disregard of the existence of the large number of negroes in Harris County qualified to serve on grand juries, and in itself shows the unlawful discrimination complained of as stated by Judge Henderson in *Smith* v. *State*, 77 S. W. 453:

> "An effort to comply with the Fourteenth Amendment and the decisions thereunder, instead of endeavoring to avoid the same, in a colored population shown to exist in Grayson county, might have entitled the negro race to a greater representation on both the grand and petit juries than is here shown."

Petitioner does not contend that the facts of the cited cases are "on all fours" with the facts of the instant case. But the difference is merely one of form, not of substance. In those cases, the discrimination, unlawful and prohibited, was at least open, honest and above-board. Negroes were excluded because those charged with the administration of the law honestly believed members of that race inferior and unfit to serve either as grand or petit jurors. In the case at bar, however, the discrimination is covered with a thin veneer of compliance with the law but which even upon a superficial examination appears inescapably as a scheme to evade the law. As was said in *Norris* v. *Alabama, supra:*

> "When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but

> also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured.

It is true that both Elliot and Culpepper, the two commissioners who testified in answer to questions of the District Attorney, stated that they "did not intentionally, arbitrarily and systematically discriminate against any negro being selected on that grand jury." But may their mere *declarations* overcome their *acts* of discrimination?

This question has been answered by Chief Justice Hughes in *Norris* v. *Alabama*, 294 U. S. 598, 55 S. Ct. 579, as follows:

> "And the commissioner testified that in the selections for the jury roll no one was 'automatically or systematically' excluded, or excluded on account of race or color; that he 'did not inquire as to color', that was not discussed.
>
> But, in appraising the action of the commissioner, these statements cannot be divorced from other testimony. As we have seen, there was testimony, not overborne or discredited, that there were in fact negroes in the county qualified for jury service. That testimony was direct and specific. After eliminating those persons as to whom there was some evidence of lack of qualifications, a considerable number of others remained. The fact that the testimony as to these persons fully identified, was not challenged by evidence appropriately direct, cannot be brushed aside."

Precisely what took place in the instant case. Here, too, Commissioner Elliot testified "I made no investigation to determine the number of negroes who had paid their poll

tax. I did not make any effort to determine whether any negro possessed the qualifications according to the statute." And Commissioner Culpepper testified: "I did not suggest the name of any negro to be placed on the list, because I wasn't personally acquainted with any member of the negro race." However, both further testified that they assumed there were quite a number of eligible grand jurors among the negroes of Harris County.

In its original opinion, the Court of Criminal Appeals of Texas upbraids the attorneys for petitioner with the statement:

> "This is rather a serious charge against the officers charged with the administration of the law. They are not only presumed to fairly and impartially administer the same, but under their oath are bound to do so; and in the absence of clear and convincing proof to the contrary, the presumption obtains that they did so."

We respectfully submit that a complete answer to the quoted statement is found in the testimony of the clerk of the District Court, already quoted. For what presumption obtains in the face of a record of evasion established by the regularity with which it has occurred? Is it necessary to show *complete exclusion* in order to prove denial of *equal* protection of the laws? Is it equal protection when, in *nearly ten years,* one per cent of the grand juries are composed of negroes, while more than twenty per cent of the population is of that race? Is it more than a mere gesture at compliance *when never at any time has more than one negro been even placed on the grand jury panel and even then, almost invariably, he is placed with deadly accuracy as number sixteen,* considering that the judge himself testified that *it was his understanding of the law that the grand jury should be composed of the first twelve?*

In the cited cases from Alabama, Florida, Louisiana and Oklahoma, the administrative officers had the candor to defy

the United States Constitution by utterly ignoring or intentionally disregarding the negro race, while in the case at bar they have cleverly contrived to conceal their design of circumventing the Constitution. But have they not just as effectively denied the spirit of the Fourteenth Amendment? As said by Judge Henderson in *Smith* v. *State,* 77 S. W. 453, at page 454:

> "While we fully understand the sentiment that may have actuated the officers of the court below, and appreciate their disinclination to place the administration of the law, even in part, in the hands of a people assumed to be inferior to the white race, yet under the law and before the law all are equals, and in its administration no favors can be shown, nor can either the letter or spirit of the law be ignored."

The findings of fact of the Court of Criminal Appeals of Texas are not binding upon the Supreme Court of the United States.

Strauder v. *West Virginia,* 100 U. S. 303, 308, 309, 35 L. Ed. 664;

Norris v. *Alabama,* 294 U. S. 597, 55 S. Ct. 579, 580, 79 L. Ed. 1074.

Virginia v. *Rives,* 100 U. S. 313, 319, 25 L. Ed. 667.

The eloquent words of Justice Black, speaking for the Supreme Court of the United States in *Pierre* v. *State of Louisiana,* 59 S. Ct. 536, 306 U. S. 354, come to mind. He there said:

> "Yet, when a claim is properly asserted—as in this case—that a citizen whose life is at stake has been denied the equal protection of his country's laws on account of his race, it becomes our solemn duty to make independent inquiry and determination of the disputed facts—for equal protection to all is the basic principle upon which justice under law rests. Indictment by grand jury and trial by jury cease to harmonize with

> our traditional concepts of justice at the very moment particular groups, classes or races—otherwise qualified to serve as jurors in a community—are excluded as such from jury service. The Fourteenth Amendment intrusts those who because of race are denied equal protection of the laws in a State first 'to the revisory power of the higher courts of State, and ultimately to the review of this court.' "

The practice of the administrative officers of the Criminal District Court of Harris County, Texas, as disclosed by this record, clearly shows a sophisticated evasion of the law rather than an honest attempt to comply with the law. Such attempt at evasion has been outlawed by this Court in *Lane* v. *Wilson, supra.*

Speaking through Justice Frankfurter, the Court said:

> "We, therefore, cannot avoid passing on the merits of plaintiff's constitutional claims. The reach of the Fifteenth Amendment against contrivances by a state to thwart equality in the enjoyment of the right to vote by citizens of the United States regardless of race or color, has been amply expounded by prior decisions."
>
> *Quinn* v. *United States,* 238 U. S. 347, 35 S. Ct. 926, 59 L. Ed. 3140, L. R. A. 1916A, 1124;
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> *Myers* v. *Anderson,* 238 U. S. 368, 35 S. Ct. 932, 59 L. Ed. 1349.

The Amendment nullifies sophisticated as well as simple minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race. When in Guinn *v.* United States, supra, the Oklahoma "grandfather clause" was found violative of the Fifteenth Amendment, Oklahoma was confronted with the serious task of devising a new registration system consonant with her own political ideas but also consistent with the Federal Constitution. We are compelled to conclude, however reluctantly, that the legis-

> lation of 1916 partakes too much of the infirmity of the "grandfather clause" to be able to survive." (Italics added.)

Throughout every age and in every country, minorities—racial, religious, social or political—have been oppressed or ignored by devious methods, ofttimes ingenious and sometimes ridiculous.

The edicts of Caligula were placed too high to be read; the lone negro on the Harris County grand jury panel too low to be reached. It is against such unjust practices that the Fourteenth Amendment stands.

It is respectfully submitted that the very strange character of this case as shown by the record, coupled with the claim that your petitioner has been denied the equal protection of the laws, makes this a case of grave public concern, calling for the exercise by this Honorable Court of its supervisory powers to the end that rights guaranteed under the Constitution of the United States shall be preserved.

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EXHIBIT A.

IN THE COURT OF CRIMINAL APPEALS OF TEXAS—AT AUSTIN.

Appeal from Harris County.

No. 20,768.

EDGAR SMITH, Appellant,

vs.

THE STATE OF TEXAS, Appellee.

Appellant's Motion for Rehearing.

Comes now Edgar Smith, appellant in the above entitled and numbered cause, and, within the time provided by law, files this his Motion for Rehearing and respectfully moves this Court to set aside its judgment of affirmance rendered herein on January 24, 1940, for the following reasons, to-wit:

I

The Court erred in affirming the judgment of the trial court, overruling appellant's motion to quash the indictment as reflected in his Bill of Exceptions No. 1, for the reason that the undisputed evidence adduced upon the hearing of said motion, and particularly the evidence of the clerk of the trial court, conclusively establishes as a matter of law the unlawful discrimination complained of.

II

The Court erred in overruling appellant's challenge to the sufficiency of the evidence for the reason that the undisputed evidence shows that appellant was found by the son-in-law of prosecutrix asleep or lying down on the front porch of the house where the offense is alleged to have taken place, and that such evidence raises a reasonable doubt as

a matter of law, to the benefit of which the defendant is entitled.

Argument.

I

In his motion to quash the indictment, appellant contended that the Grand Jury Commissioners of Harris County, Texas, had for a period of many years arbitrarily and systematically excluded negroes from serving on the Grand Jury, or that the number of negroes selected by the Grand Jury Commissioners for service on the Grand Jury for many years prior to the indictment of appellant had been so negligible as in itself to show and establish such unlawful discrimination, etc., and that no negro was a member of the Grand Jury which indicted him. The motion contains other essential allegations which it is not deemed necessary to repeat herein. Though the Court in its opinion (bottom of page 1) states that

"*All* of the Grand Jury Commissioners stated there was nc express and intentional disregard for members of the negro race,"

the evidence shows that only two of the commissioners testified. Card G. Elliot, one of the commissioners, stated that they selected the Grand Jurors merely from their personal acquaintance with the people over the country; that they had neither a poll-tax list nor a property-tax list while making the selection; that he assumed that there were quite a number of eligible Grand Jurors among the negroes of Harris County, "but I don't know how many have paid their poll-tax. I made no investigation to determine the number of negroes who had paid their poll-tax. I did not make any effort to determine whether any negro possessed the qualifications according to the statute. I don't know if the other commissioners did; if they did, I don't know."

The other commissioner, T. L. Culpeper, testified

"I did not suggest the name of any negro to be placed on the list, because I wasn't personally acquainted with any member of the negro race."

This utter disregard of the existence of the large number of negroes in Harris County qualified to serve on grand juries, in itself shows unlawful discrimination, as stated by Judge Henderson in *Smith* v. *State,* 77 S. W. 453,

"An effort to comply with the fourteenth amendment and the decisions thereunder, instead of endeavoring to avoid the same, in a colored population shown to exist in Grayson county, might have entitled the negro race to a greater representation on both the grand and petit juries than is here shown."

But that is not all. The undisputed evidence adduced upon the hearing of the motion to quash the indictment shows:

That no Negro served upon the Grand Jury which indicted the defendant, nor was any Negro drawn as a member of the Grand Jury panel of sixteen from which the Grand Jurors were selected by the court; that no Negro served on any Grand Jury during the entire year of 1938; that more than twenty per cent of the population of Harris County, Texas, at all times material to this inquiry, were Negroes; that of eighty-five thousand poll taxes of both men and women paid, eight thousand were Negroes and of which eight thousand Negroes some four thousand to six thousand of them were men possessing the qualifications of Grand Jurors as enumerated in the statute; that only the better class of the Negro population of said county are sufficiently interested to pay their poll taxes and those who pay their poll taxes at all represent the better type and law-abiding Negro population; that of those Negroes who were shown to have paid their poll taxes many of them are high school graduates and elementary, high school and college teachers, also members of various professions, and all possessing the qualifications of Grand Jurors; that only one Negro for the entire year of 1938 was merely placed upon the Grand Jury panel of sixty-four names during the said year, and he did not actually serve because "There were twelve qualified grand jurors on the list before him, and his name was not reached." (testimony of District Clerk) That during the past ten years the record shows the names of only eighteen Negroes were drawn by the Grand Jury

Commissioners out of a total list of six hundred and forty constituting the total Grand Jury panel for such period; that the last Negro to serve on a Grand Jury of Harris County was Alex Taylor, a member of the Grand Jury for the February term, 1936; that another Negro, Lewis Watson, served as a member of the May term, 1934; that a Negro, Homer E. McCoy, served on the May term, 1932; W. P. Cartwright served in November, 1931; that of the three Grand Jury Commissioners appointed by the court to select the Grand Jury no Negro has ever been appointed within the memory of the clerk of the court nor of the Trial Judge, both of whom testified at the said hearing; that of the total of four hundred and eighty Grand Jurors who actually served during the past ten years only five were Negroes; that never more than one Negro was ever drawn by the Grand Jury Commissioners and this has occurred not more than twice in any year for the past ten years except the year 1935, and that almost invariably the Negro's name appears No. 16 upon the list, and that as a general rule the court in selecting the Grand Jury from the Grand Jury panel calls the first twelve on the list.

It is true that both Elliot and Culpepper, the two commissioners who testified, in answer to questions of the District Attorney, stated that they "did not intentionally, arbitrarily and systematically discriminate against any negro being selected on that grand jury" But may their mere *declarations* overcome their *acts* of discrimination?

This question has been answered in the negative by Chief Justice Hughes in *Norris* v. *Alabama,* 294 U. S. 587, 55 Sup. Ct. 579, as follows:

"And the commissioner testified that in the selections for the jury roll no one was 'automatically or systematically' excluded, or excluded on account of race or color; that he 'did not inquire as to color' that was not discussed.

But, in appraising the action of the commissioners, these statements cannot be divorced from other testimony. As we have seen, there was testimony, not overborne or discredited, that there were in fact negroes in the county qualified for jury service. That testimony was direct and spe-

cific. After eliminating those persons as to whom there was some evidence of lack of qualifications, a considerable number of others remained. The fact that the testimony as to these persons fully identified, was not challenged by evidence appropriately direct, cannot be brushed aside."

We respectfully call the court's attention particularly to the testimony of R. J. Lindley, the clerk of the Criminal District Court, which reveals the practice for some ten years prior to the time when the indictment against appellant was returned.

That John Kerr was the only negro on the grand jury panel for 1938, but was not taken because he was too far down on the list; that Pierre Marks, another negro, was on the list for the November term of 1937, but that he did not serve for the same reason.

Alex Taylor was on the list for the February term of 1936 and was the only negro who served on the grand jury during the entire year.

W. B. Watson was on the list for the November term of 1935 but he did not serve but the reason is not shown.

L. G. Luper was on the grand jury panel for the May term of 1935. He was number 16 on the list and of course he was not selected.

T. M. Fairchild, a negro, was likewise sixteenth on the list for the February term of 1935 and did not serve for the same reason.

James D. Ryan was number 16 on the list for the August term of 1934. He did not serve.

Harry Mack was number 16 on the list for the May term of 1933 and did not serve.

Bernice Booth was number 16 on the list for the August term of 1931 and did not serve.

In conclusion Mr. Lindley testified that he had never seen a negro Grand Jury Commissioner since the date when the court was first created on January 1, 1928. Judge King's testimony on this point went further back, stating 'I don't know of any negro being a Grand Jury Commissioner as far back as 1925.

Lindley's testimony is a complete answer to the statement in the Court's opinion that

"We would not be justified in ferreting out such scheme when the evidence was sharply conflicting as to the existence of discrimination at all."

And his testimony is also a complete answer to the further statement of the Court that

"This is rather a serious charge against the officers charged with the administration of the law. They are not only presumed to fairly and impartially administer the same, but under their oath are bound to do so; and in the absence of clear and convincing proof to the contrary, the presumption obtains that they did so."

For what presumption obtains in the face of a record of evasion established by the regularity with which it has occurred? Is it necessary to show *complete exclusion* in order to prove denial of *equal* protection of the laws? Is it equal protection when, *in ten years,* one per cent of the grand juries are composed of negroes, while more than twenty per cent of the population is of that race? Is it more than a mere gesture at compliance *when never at anytime has more than one negro been even placed on the grand jury panel and even then, almost invariably, he is placed with deadly accuracy as number sixteen,* considering that the judge himself testified that *it was his understanding of the law that the grand jury should be composed of the first twelve?*

In the cases we have cited in our original brief, from Alabama, Florida, Louisiana and Oklahoma, the administrative officers had the candor to defy the United States Constitution by utterly ignoring or intentionally disregarding the negro race, while in the case at bar they have cleverly contrived to conceal their design of circumventing the Constitution. But have they not just as effectively denied the spirit of the Fourteenth Amendment? As said by Judge Henderson, speaking for this court in Smith *v.* State, 77 S. W. 453, at page 454:

"While we fully understand the sentiment that may have actuated the officers of the court below, and appreciate their

disinclination to place the administration of the law, even in part, in the hands of a people assumed to be inferior to the white race, yet under the law and before the law all are equals, and in its administration no favors can be shown, nor can either the letter or spirit of the law be ignored."

He had first known the negro race when yet in slavery. He had lost an arm at Sharpsburg fighting for the Confederacy. He had suffered and had survived the ravages of Reconstruction. Yet when it came to apply the fundamental law of the land to the facts of the case, this great judge, speaking for this Court, with the concurrence of Judge Davidson, another great judge whose experiences were not unlike his own, remembered that he had taken an oath which did not prevent him from *ferreting out* schemes to evade the law because of a mere presumption that the administrative officers had done their duty fairly and impartially. The eloquent words of Justice Black, speaking for the Supreme Court of the United States in Pierre *v.* State of Louisiana, 59 Sup. Ct. Rep. 536, 306 U. S. 354, come to mind. He there said:

"Yet, when a claim is properly asserted—as in this case—that a citizen whose life is at stake has been denied the equal protection of his country's laws on account of his race, it becomes our solemn duty to make independent inquiry and determination of the disputed facts—for equal protection to all is the basic principle upon which justice under law rests. Indictment by Grand Jury and trial by jury cease to harmonize with our traditional concepts of justice at the very moment particular groups, classes or races—otherwise qualified to serve as jurors in a community—are excluded as such from jury service. The Fourteenth Amendment intrusts those who because of race are denied equal protection of the laws in a State first 'to the revisory power of the higher courts of State, and ultimately to the review of this court.' "

Nor may sophisticated evasion of the law shown by the record in this case be disregarded. See Lane *v.* Wilson, 59 Sup. Ct. Rep. 872, 307 U. S. 268.

II.

Finally, we can not forbear from expressing surprise that in our attack upon the sufficiency of the evidence, the most salient feature, the most outstanding circumstance of innocence which, standing alone, sets this case apart from the general proposition that upon an issue of fact the jury's verdict is decisive,—that is, the failure of the negro defendant to flee but on the contrary his remaining on the premises at the scene of the alleged crime and actually going to sleep, was not even mentioned in the court's opinion. Surely, for the benefit of the jurisprudence of this State, it ought to be announced that such fact comports with human experience and what staggered credulity in the days of our forebears, has become a commonplace in this credulous age.

Let the judges and the lawyers and the people of Texas be told that the undisputed facts, appellant's going to sleep on the front porch of the house where he is alleged to have committed rape upon a white woman by force and his being found there by the son-in-law of prosecutrix, do not, in the opinion of this Court, create that reasonable doubt as a matter of law to the benefit of which appellant was entitled, in accordance with the superior and paramount rule of evidence pronounced in 18 Tex. Jur., page 430, and fully quoted in our original brief (page 18).

Wherefore, appellant prays that this his Motion for Rehearing be granted, that the judgment of the trial court overruling his motion to quash the indictment be reversed, that such indictment be quashed and the prosecution dismissed. He further prays, in the alternative only, that because of the insufficiency of the evidence upon the issue of guilt the judgment of the trial court be reversed and this cause remanded for a new trial.

Respectfully submitted,

(Signed) SAM W. DAVIS,
HARRY W. FREEMAN,
Attorneys for Appellant.

EXHIBIT B.

From the Code of Criminal Procedure of Texas.

Article 338. Shall Select Grand Jurors.

The jury commissioners shall select sixteen men from the citizens of the different portions of the county to be summoned as grand jurors for the next term of the court.

Article 339. Qualifications.

No person shall be selected or serve as a grand juror who does not possess the following qualifications:

1. He must be a citizen of the State, and of the county in which he is to serve, and qualified under the Constitution and laws to vote in said county; but, whenever it shall be made to appear to the court that the requisite number of jurors who have paid their poll taxes can not be found within the county, the court shall not regard the payment of poll taxes as a qualification for service as a juror.

2. He must be a freeholder within the State, or a householder within the county.

3. He must be of sound mind and good moral character.

4. He must be able to read and write.

5. He must not have been convicted of any felony.

6. He must not be under indictment or other legal accusation for theft or of any felony.

EXHIBIT C.

Section 5 of Article 5, Constitution of the State of Texas:

The Court of Criminal Appeals shall have appellate jurisdiction co-extensive with the limits of the State in all criminal cases of whatever grade, with such exceptions and under such regulations as may be prescribed by law.

EXHIBIT D.

Article 819, Code of Criminal Procedure of Texas. Receipt of Mandate.

When the clerk of any court from whose judgment an appeal has been taken in felony cases wherein bail has been allowed shall receive the mandate of the Court of Criminal Appeals affirming such judgment, he shall immediately file the same and forthwith issue a capias for the arrest of the defendant for the execution of the sentence of the court, which shall recite the fact of conviction, setting forth the offense and the judgment and sentence of the court, the appeal from and affirmance of such judgment and the filing of such mandate, and shall command the sheriff to arrest and take into his custody the defendant and place him in jail and therein keep him until delivered to the proper penitentiary authorities, as directed by said sentence. The sheriff shall forthwith execute such capias as directed.